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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1959.

No. 307

ILLINOIS DISTRICT COUNCIL OF THE ASSEMBLY OF GOD, a Corporation,
Petitioner,

vs.

OLD SALEM CHAUTAUQUA ASSOCIATION, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois, Cause No. 35,088.
There Heard on Appeal from the Circuit Court of Menard County, Illinois.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

The Illinois District Council of the Assembly of God, a Corporation, Petitioner, hereby respectfully petitions the Supreme Court of the United States for a Writ of Certiorari, directed to the Supreme Court of Illinois, the state court of last resort. Said court passed final judgment in this cause by denying a Petition for Rehearing after having affirmed the judgment of the court below, holding in favor of the Old Salem Chautauqua Association, a Corporation, Respondent in this cause, and Plaintiff-Appellee in the Illinois Supreme Court.

REPORTS OF OPINIONS IN COURTS BELOW.

The Illinois Supreme Court published a full opinion, dated March 20, 1959, and a copy of that opinion is appended hereto.

The final decision of the Supreme Court was made on date of May 19, 1959, when the appellant's Petition for a Rehearing was denied. A copy of the ruling is appended hereto.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

I.

The judgment sought to be reviewed became final on date of May 19, 1959 when the Illinois Supreme Court denied the appellant's Petition for a Rehearing. A copy of said ruling is appended hereto.

II.

The statutory provision which confers jurisdiction on this Court is Title 28, Section 1257, U. S. Code, Ann., which is as follows:

> 1257. State courts; appeal; certiorari.
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . .
>
> (2) . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

THE QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

1. Where the Illinois Supreme Court in the former case involving the same parties and the same pleadings (Case No. 34,591, reported at 13 Ill. 2d 258) ordered that the case be re-tried in accordance with the doctrine of Thompson v. McGrue, 3 Ill. 2d 168, and where in Thompson v. McGrue the Supreme Court of Illinois stated, "the Court was required to provide the defendant the opportunity to make proof of plaintiff's lack of title," was not the defendant denied due process of law when it was denied the privilege of presenting evidence showing that plaintiff did not have title because the plaintiff had lost the premises through foreclosure and the Defendant Church had purchased the premises?

2. When the Defendant Church purchased the premises in 1943, paid for same, occupied same, and spent thousands of dollars in improving the premises, was not the Defendant Church denied due process of law when it was denied the right to prove its purchase, its occupancy, and its expenditure of large sums of money in improving the premises?

3. Does not due process of law prohibit the taking of another's property without affording the true owner the opportunity of proving his title by purchase?

4. Does not due process of law prohibit such practice as hearing one side only, and refusing to hear testimony introduced by both sides?

5. Does due process of law permit the taking of a purchaser's property without the opportunity to show his title, his occupancy, and his expenditure of huge sums of money on the property which he has purchased?

6. Can the Supreme Court of Illinois, under the due process clause of the U. S. Constitution, blow hot one moment and cold another by decreeing that the parties proceed to retrial under the doctrine of Thompson v. McGrue (3 Ill. 2d 168) and then deny the defendant the right to be heard as required by the doctrine of Thompson v. McGrue?

7. Does not due process of law require that every possible avenue of evidence be opened to a litigant who claims that he has purchased and paid for the property which another seeks to take?

8. Does not due process of law require that every cause be tried in accordance with the principles of substantial justice in order that right, truth, honesty and justice may prevail?

CONSTITUTIONAL PROVISIONS INVOLVED.

"Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment XIV.

ASSIGNMENTS OF ERROR.

Petitioner assigns as error the following:

1. The refusal of the Court to permit the Defendant (Petitioner here) to testify as to facts showing Defendant's purchase of the premises in question.

2. The deprivation of due process in refusing to hear Defendant's testimony showing its purchase, and showing the Plaintiff's loss of the premises through foreclosure proceedings.

3. The deprivation of due process in receiving the Plaintiff's (Respondent here) evidence and refusing to permit Defendant's (Petitioner here) witnesses to testify.

4. The deprivation of the Defendant's right to a full and fair hearing.

STATEMENT OF THE CASE.

On April 9, 1954, the plaintiff, Old Salem Chautauqua Association, filed a complaint in ejectment against the defendant, Illinois District Council of the Assembly of God, claiming that the defendant wrongfully entered the premises of plaintiff on date of December 24, 1943, and that the defendant continues to wrongfully withhold possession from the plaintiff. The land which was made the subject of the complaint was described as the athletic grounds, the boat landing, and the auditorium. The complaint had attached as an exhibit a demand which the plaintiff had made on the defendant (Abst. pp. 2-6).

The defendant filed an answer, after which time the plaintiff filed a motion to strike the answer. The defendant then filed an amended answer and a complaint to quiet title, alleging that the defendant had title by virtue of foreclosure proceedings which had been held against the plaintiff in 1943, and the warranty deed to the defendant, conveying the premises to the defendant on date of December 24, 1943 (Abst. pp. 10-16). On page 17 of the Abstract there is attached as an exhibit a plat of the premises in question. There was also attached as exhibits copies of the mortgage which was made by the plaintiff on December 10, 1926 (Abst. pp. 22-28). There was also attached to the answer as an exhibit a copy of the master's deed, dated February 13, 1943, and conveying the premises away from the plaintiff and conveying to Ellen Tucker, purchaser at the foreclosure sale. This deed was dated February 13, 1943 (Abst. pp. 28-33).

There was also attached to defendant's amended answer and marked as an exhibit, a copy of the warranty deed, dated December 24, 1943, and conveying the premises in question to the defendant, Illinois District Council of the Assembly of God (Abst. pp. 32-35).

The plaintiff filed a further motion to strike the amended answer, and a second amended answer was filed. It was the second amended answer that the Illinois Supreme Court held to be good in the appeal which followed (13 Ill. 2nd 258), and, therefore, the second amended answer is the only pleading of the defendant which is of importance. In the second amended answer the defendant made a general denial, **and pleaded that the defendant had title by virtue of the foreclosure of plaintiff's mortgage and the subsequent purchase of the premises by the defendant on date of December 24, 1943 (Abst. pgs. 39-44).** Attached to the second amended answer were copies of the plaintiff's mortgage, **a copy of the master's deed conveying away from the plaintiff, and a copy of the warranty deed conveying the premises to the defendant on date of December 24, 1943 (Abst. p. 45).**

There were further arguments on the pleadings, and the trial court ruled against the defendant on the pleadings. The case was then taken to the Illinois Supreme Court as Case No. 34,162. Counsel for the defendant confessed error in the Supreme Court case, and the Supreme Court sent the case back to the Circuit Court of Menard County for further proceedings (Abst. p. 53).

Defendant then employed its present counsel, and the case was further heard in the Circuit Court of Menard County. Defendant asked leave to file a third amended answer and a counterclaim, and this motion was denied by the trial court. The trial court then entered judgment on the pleadings and awarded the premises to the plaintiff on the pleadings. This case was then appealed to the Supreme Court in case No. 34,591 and is reported at 13 Illinois 2nd 258. The Supreme Court held that the case should proceed to hearing on the second amended answer which is found in the Abstract at pages 39-45. The Supreme Court also held that the case should proceed in accordance with the views expressed in the case of Thompson v. McGrue, 3 Ill. 2nd 168.

The case was then heard on remandment. Defendant relied upon the mandate of the Supreme Court in instructing that the case proceed in accordance with the views expressed in the case of Thompson v. McGrue, 3 Ill. 2nd 168. It is important to note that in the case of Thompson v. McGrue that the Illinois Supreme Court held that **the trial court was required to provide the defendant the opportunity to make proof of plaintiff's lack of title; that a plaintiff in an ejectment action must recover on the strength of his own title and not on the weakness of that of his adversary, and plaintiff must show a fee simple title at law in himself** (Thompson v. McGrue, 3 Ill. 2nd 168, 173, 174; 175).

Edward Houghton, one of plaintiff's witnesses, testified that the plaintiff had occupied the premises from 1904 to

1943, and that the athletic field and the auditorium had been used by the plaintiff during that period of time. (The controversy with reference to the boat landing had been disposed of in the previous proceedings, and the only premises in dispute in this proceeding concern the auditorium and the athletic field.) Mr. Houghton, who has been president of the plaintiff association since 1947, stated that the defendant had rented the premises prior to the year 1944, but that the defendant stopped paying rent about the year 1944 when, as stated by Mr. Houghton, "they (the Defendant Church), took over a certain mortgage that covered certain properties on the Chautauqua grounds, and then they used the auditorium and athletic grounds and kept up the expenses on them and the water system" (Abst. p. 78).

Forrest Hatch was called as a witness for the plaintiff and testified that he has been acquainted with the premises since the year 1898. Mr. Hatch testified that prior to the year 1943 the plaintiff association had a custodian on the premises, but that from 1943 on the custodians were employed by and paid by the defendant (Abst. p. 81). Mr. Hatch testified that the defendant made all of the repairs on the auditorium from 1942 or 1943 on (Abst. p. 82).

Mrs. Jerome Finkel was called as a witness for the plaintiff. Mrs. Finkel testified that she has been secretary of the plaintiff association since 1947. Mrs. Finkel testified that the Chautauqua Association did not make use of the auditorium after the year 1943, but that it had used the premises from 1900 to 1943 (Abst. p. 84).

Mrs. Finkel, **as a witness for the plaintiff**, testified that she was familiar with the fact that there was a mortgage made by the plaintiff in the year 1926 and that the mortgage was foreclosed in 1943. **She admitted that in December, 1943, the defendant church made a purchase**

as a result of the foreclosure of this mortgage (Abst. pp. 84-85). Mrs. Finkel also testified that since 1944 the caretaker has been paid by the defendant church and that the plaintiff association has not paid the caretaker (Abst. p. 87).

The plaintiff called as its last witness Allen Smith, Circuit Clerk and recorder of Menard County, and through him proved that the premises in question were conveyed to the plaintiff by quit-claim deed on date of May 28, 1917 (Rec. p. 255, Abst. p. 87). At that point the plaintiff rested.

There was no evidence in the record showing any title in the plaintiff from date of May 28, 1917, to the date of the hearing, and no evidence showing a continuation of the title and disproving the affirmative allegation set forth in defendant's answer wherein the defendant pleaded the mortgage of the plaintiff in 1926, foreclosure of that mortgage in 1943, and purchase by the defendant on date of December 24, 1943 (Abst. pp. 39-45).

We again point out that in the former case before the Illinois Supreme Court the Supreme Court directed that this case be retried in accordance with the views expressed in the case of Thompson v. McGrue, 3 Ill. 2nd 168 (Old Salem Chautauqua Association v. Illinois District Council of the Assembly of God, 13 Ill. 2nd 258). We further point out that the case of Thompson v. McGrue, the doctrine of which we were instructed to follow and were given a right to follow, holds that (quoting), "The Court was required to provide the defendant the opportunity to make proof of plaintiff's lack of title". The following paragraphs constitute the evidence of the defendant, and show clearly the defendant's attempt to follow the doctrine of Thompson v. McGrue, and defendant's attempt to claim the benefits of that doctrine.

In presenting its defense, the defendant called as a witness Thomas F. Zimmerman. Mr. Zimmerman was assistant district superintendent of the defendant church during the year 1943. He testified that in 1942 he met one Will Luthringer, who was then president of the Chautauqua Association, plaintiff ~~herein~~. Mr. Zimmerman testified that Mr. Luthringer stated to him that the Chautauqua Association was no longer in a position to continue as an organization and that they were not able to satisfy the mortgage on the property, and Mr. Luthringer suggested that the defendant church purchase the premises (Abst. p. 92). Mr. Zimmerman testified further that Mr. Luthringer took Mr. Zimmerman and other officers of the defendant church on a tour of the properties, and that Mr. Luthringer pointed out to the church officers that the premises to be included in the proposed purchase were the tabernacle (the auditorium) and the athletic field (Abst. p. 93). **Please note that Mr. Luthringer was president of the plaintiff association.**

At this point counsel for the plaintiff objected to this line of testimony and the Court sustained the objection.

Counsel for the defendant then made an offer of proof which, briefly stated, was that if Mr. Zimmerman were permitted to testify that he would testify that he had a meeting with Mr. Luthringer, **president of the plaintiff Chautauqua Association in 1942, and** that Mr. Luthringer stated that the mortgage was about to be foreclosed; that Mr. Luthringer stated that he would attempt to negotiate a sale of the premises in question, including the auditorium and the athletic field. The offer of proof stated further that Mr. Zimmerman would testify that there were foreclosure proceedings in 1943 and that after the foreclosure proceedings Mr. Zimmerman and other officers of the defendant church had a meeting with Mr. Luthringer at which time Mr. Luthringer pointed out that the auditorium and the athletic field were portions of the premises which would be purchased if the defendant made the purchase. That thereafter the defendant entered into a contract to purchase the premises and that later the deed was delivered to the plaintiff by Ellen Tucker, who had purchased the premises at the foreclosure sale (Abst. pp. 94-96).

The offer of proof further offered to prove that Mr. Zimmerman would testify that prior to the year 1943 the defendant had been paying rent to the plaintiff in the amount of $350.00, but that after the year 1943 the defendant stopped paying rent and has not paid rent since that time; that the defendant started making repairs in 1943 and continued making repairs until the present date, and that the plaintiff has not made any demand for the premises since 1943 until immediately prior to the institution of the present proceedings (Abst. p. 96).

Counsel for the defendant also offered to prove that W. R. Williamson (erroneously designated as W. R. Wilson throughout the Record—our comment) and T. A. Kessel, if permitted to testify, would testify identically as set forth in the offer of proof pertaining to the testimony of Thomas F. Zimmerman, and a like offer of proof was made. Objections to the form of making the offer were waived, and the Court held that the evidence offered was not relevant or material (Abst. pp. 98-99).

Defendant attempted to show through Mrs. Jerome Finkel, the secretary of the plaintiff association, the execution of the mortgage, the foreclosure, and the subsequent master's deed. The Court sustained objections to the questions propounded, and the defendant made an offer of proof, offering to prove that if Mrs. Finkle were permitted to testify that she would testify that the plaintiff executed a mortgage on date of December 10, 1926, that said mortgage was foreclosed, and that on February 13, 1943, **there was executed a master's deed conveying the premises in question to one Ellen Tucker. The offer of proof stated further that Mrs. Finkle would testify that Ellen Tucker conveyed the premises in question on date of December 24, 1943, to the defendant, Illinois District Council of the Assembly of God, and that said deed was filed on date of February 1, 1944, in Menard County Deed Record 80 at page 605** (Abst. pp. 101-102). The trial court held that such proof was irrelevant and immaterial, and refused to accept same.

The Court then entered judgment, finding that the premises in question had been proven to be the premises of the plaintiff, and conveying the athletic grounds and the auditorium, which were the only premises in dispute, to the plaintiff (Abst. p. 105).

From that judgment an appeal was taken to the Illinois Supreme Court, in the case entitled Old Salem Chautauqua Association, a Corporation, Plaintiff-Appellee, vs. Illinois District Council of the Assembly of God, a Corporation, Defendant-Appellant, No. 35,088, the case which is the subject of this Petition.

The opinion is printed in the Appendix to this petition. The Supreme Court sustained the judgment of the lower court, and it is from that decision that this appeal is taken.

Portions of the opinion which we deem important to point out in this statement are as follows:

> "The evidence established that plaintiff acquired title to lands which included those here in dispute by deed dated May 28, 1917, and the parties stipulated the existence of a continuous chain of title from the

government to the date of that deed. When a particular title has been proved, the presumption is that title and ownership continue to exist as established until some change or alienation is shown." (Opinion, paragraph 11.)

"Thus, the presumption prevailed in favor of the validity of plaintiff's title and the subserviency of defendant's possession to that title until overcome by evidence to the contrary. (Augustus v. Lydig, 353 Ill. 215, 220.) There is no evidence of any transfer or conveyance by plaintiff of the two parcels involved subsequent to May 28, 1917, and the presumption is that its title, as established, continued to exist." (Opinion, paragraph 12.)

"Plaintiff proved continuous use and possession of the disputed lands from May 28, 1917, to the date in 1943 when defendant admittedly entered, as well as prior use and possession from about 1898 to the date of the deed. In an action of ejectment, plaintiff may recover upon proof of a prima facie title which may be shown by proof of actual possession under a deed or other claim of ownership. (Thompson v. McGrue, 3 Ill. 2d 168, 173 and 174; Schillo v. Martin, 397 Ill. 211, 216.) When such showing has been made, it devolves upon defendant to introduce evidence to overcome that title and prima facie right to possession. (Schillo v. Martin, 397 Ill. 211.) The proof in this case was sufficient to establish prima facie title and right to possession in the plaintiff. Defendants introduced no evidence to overcome the right and title shown to exist. Absent such proof, plaintiff was entitled to a judgment for possession." (Opinion, paragraph 13.)

After the Illinois Supreme Court handed down the decision, the defendant filed a petition for a rehearing, **emphasizing the fact that, since the Supreme Court in the former** case directed that we proceed on re-trial in accordance with the doctrines of Thompson v. McGrue, 3 Ill. 2d 168, that we were entitled to the benefits of that doctrine, and were entitled to show the plaintiff's lack of title, as was done in Thompson v. McGrue. On date of May 19, 1959, the petition for rehearing was denied and the judgment of the Illinois Supreme Court became final on that date.

The Point of deprivation of due process of law was preserved in the courts below, as shown in paragraph ten (10) of the Supreme Court opinion (Appendix A).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

May It Please the Court:

In this case the Illinois Supreme Court has denied this defendant the right of due process of law. Throughout these proceedings the defendant has attempted time and time again to introduce evidence showing that in the year 1943 the Defendant Church purchased the premises in dispute, paid for the premises, spent thousands of dollars in repairing the premises, and has occupied the premises up to the time when this litigation started in 1954. Throughout the proceedings the courts below have denied the Defendant Church the right to show its ownership through purchase.

Time and time again throughout these proceedings the Defendant Church has attempted to show that the plaintiff Chautauqua Association lost the premises through foreclosure proceedings in the year 1943, and that there was a foreclosure sale, at which time the Defendant Church purchased the premises. If there was ever a violation of the due process clause of the United States Constitution, we have that violation here.

The Illinois Supreme Court, evidently unaware of the fact that certain statements in the opinion were inconsistent with the final decision, unawaringly made certain statements. In Paragraph 13 of the opinion the court stated, "when such showing has been made it devolves upon defendant to introduce evidence to overcome that title and prima facie right to possession. The proof in this case was sufficient to establish prima facie title and right to possession in the plaintiff. Defendant introduced no evidence to overcome the right and title shown to exist." Now, how, under the sun could defendant introduce evidence to overcome the prima facie title when the court would not permit such introduction? The Illinois Supreme Court admits that the only way that the defendant can protect its property rights is to introduce evidence, and then the Supreme Court in the next breath puts its stamp of approval upon the trial court's denial of defendant's right to testify. The Illinois Supreme Court has said, in effect, "the only way that the defendant can prevail in this case is to introduce testimony proving its title and right of possession, but we will not permit the defendant to introduce such evidence." Such, we say, is a denial of due process of law.

II.

When the Supreme Court stated in the former case, being case No. 34,591, reported at 13 Ill. 2d 258, that the case was remanded for retrial in accordance with the mandate of the case of Thompson v. McGrue, 3 Ill. 2d 168, this defendant became vested with a definite and established right to proceed under the doctrine of Thompson v. McGrue. As to this defendant, the Illinois Supreme Court made the doctrine of Thompson v. McGrue the law, and the rights of the Defendant became vested under that case. The defendant became entitled to proceed in accordance with that case, and any ruling to the contrary deprived the defendant of due process of law.

Now in the case of Thompson v. McGrue, 3 Ill. 2d 168, at pages 174 and 175, the court said "the court (trial court) was required to provide the defendant the opportunity to make proof of plaintiff's lack of title." This rule, it is obvious, is a common sense rule, and a rule intended to bring about justice, honesty, truth and equality. This rule is consistent with the case interpretations of due process of law. This rule furthers and condones honesty and fair dealing.

We were happy to have this case sent back to the trial court with instructions to proceed in accordance with the ruling of Thompson v. McGrue, for we knew then that honesty and justice would prevail if that case was followed. We knew then that we would be entitled to show that we purchased these premises and paid for them, and that as a result the plaintiff would not be able to wrongfully and dishonestly take from the defendant premises which the defendant had purchased and paid for and made valuable improvements on. How disappointed we were when we were not permitted to testify! How disappointed we were when we were not permitted to present our side of the case! How disappointed we were when we were not afforded the benefit of due process of law! How disappointed we were when the court reversed itself and held that we would not be permitted to proceed in accordance with the doctrine of Thompson v. McGrue and to introduce testimony!

In paragraph 14 of the opinion the Illinois Supreme Court admits that "the issues created by the general denial of plaintiff's title and right to possession remained."

Now, since it is admitted that our general denial of plaintiff's title and right to possession remained in the case, how can it be said that we were afforded due process of law in not being permitted to testify on that point which the court admits has remained throughout in these proceedings?

Again, in paragraph 16 of the opinion the court said, "upon the issue thus joined, defendant was entitled to make proof of any fact tending to show that plaintiff had no title . . .". With this we agree. Now, we ask, how can it be said that there was due process of law when we were not permitted to introduce evidence showing that the defendant had purchased the premises and paid a good and valuable consideration for same, and had occupied the premises without interruption for 11 years, and had spent thousands of dollars in improving the premises?

We respectfully submit that the Illinois Supreme Court has permitted technicalities and unreasonable rules to overcome substantial justice. It is evident that there is nothing right or lawful about a situation which permits a defendant's property to be taken from him where he has paid a good and valuable consideration for same, and where the plaintiff has paid nothing. Under what right and under what theory can this plaintiff claim this property? Why should this property be given to a plaintiff who has not paid any consideration for same, and who has failed and refused throughout to answer our claim that the defendant has paid for the premises and has owned the premises for 11 years prior to the time when this case was filed in 1954?

The congregations which make up the defendant body are anxious that due process of law shall prevail, and they are anxious that common justice and honesty and truth shall prevail.

Being so persuaded, they respectfully pray that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of Court Below.

(See Appendix B for date of final decision.)

(Note: The paragraphs are numbered by this Petitioner for convenience in arguing.)

Docket No. 35088—Agenda 38—January, 1959.

Old Salem Chautauqua Association, Appellee, v. Illinois District Council of the Assembly of God, Appellant.

Mr. Justice Davis delivered the opinion of the court:

1. Defendant, Illinois District Council of the Assembly of God, appealed from a judgment in an ejectment action in the circuit court of Menard County which awarded possession of certain premises to plaintiff, Old Salem Chautauqua Association. The properties involved are parts of the Old Salem Chautauqua Park described in the complaint as the athletic field and auditorium. This litigation has been before us on two prior occasions.

2. In cause No. 34162, plaintiff appealed and defendant confessed each error specified in the notice of appeal and stipulated that the cause be remanded to the circuit court for further proceedings. On November 13, 1956, we entered an order allowing the confession of error and reversed and remanded the case. Thereafter, defendant appealed from a judgment awarded to plaintiff on the pleadings, and in March, 1958, in 13 Ill. 2d 258, we affirmed this judgment in part and reversed it in part and remanded the cause with directions. Our opinion detailed the substance of the pleadings and all prior proceedings leading to the appeal. In order to understand the errors assigned in the case at bar, reference to certain aspects of that opinion is necessary.

3. After such remandment, the trial court, on plaintiff's motion, redocketed the case and it was called for trial on June 16, 1958. No changes or amendments were made in the pleadings. The case was heard on plaintiff's amended complaint and defendant's second amended answer. At the outset of the trial, counsel for the parties entered into a stipulation establishing a chain of title from September 3, 1831, the date of original entry, to May 28, 1917, when the plaintiff, by deed, was vested with title to certain described lands which included the athletic field and the auditorium. They further stipulated that the property was thereafter platted and the plat filed for record, but counsel for defendant stated that it was not admitted that all lands shown on the plat are platted lands.

4. Plaintiff then produced three witnesses who testified to plaintiff's possession of the auditorium and athletic field prior to December 25, 1943, the date on which defendant admittedly entered into possession. Edward Houghton, president of plaintiff, testified that he attended camp at the park every year from 1904 to 1942, with the exception of 1916; that the plaintiff held programs in the auditorium in each of those years, with the exception of 1916 and 1919; and that during the same period the athletic field was used by members of the association for various athletic activities, including baseball and tennis. On cross-examination he admitted that defendant had rented the auditorium for several years prior to 1944, but had stopped paying rent at that time; that defendant had taken over a mortgage which covered certain parcels of the park property and then used and maintained the auditorium and athletic field; and that he had not seen plaintiff use the auditorium since 1943.

5. Forest Hatch, vice president of plaintiff, testified that the plaintiff gave programs continuously from 1898 to 1942, which were held in the auditorium; that until 1944,

the plaintiff employed custodians, and it was their duty, among other things, to mow the athletic field. On cross-examination he stated that after 1944, defendant had hired custodians, made certain minor repairs to the auditorium and kept the athletic field mowed; and that plaintiff had not held any programs in the auditorium since 1942.

6. Mrs. Jerome Finkle, plaintiff's secretary, testified that the plaintiff had used the auditorium for programs continuously from 1900 to 1942, when the last program was held. She also stated that the athletic field had been used for ball games in 1943, 1944, and 1945, and that such use was discontinued after that time because the caretaker told her the church objected. When cross-examined, she admitted that the plaintiff had not used the auditorium since the foreclosure proceedings in 1943; that defendant had hired caretakers beginning in 1944 and plaintiff had hired none since that time; and that the understanding was that the church people were to use the auditorium in consideration for maintenance. The introduction of its deed, dated May 28, 1917, concluded plaintiff's evidence.

7. Thomas F. Zimmerman testified on behalf of defendant relative to conversations in 1942 with Will Luthringer, former president of plaintiff. Counsel for plaintiff objected and the court inquired of counsel for defendant the purpose of this line of interrogation. After counsel stated its purpose, the objection was sustained. Counsel for defendant then made an offer of proof that the witness would testify that Luthringer stated in February of 1942 that he would try to negotiate for the purchase of the premises, including the auditorium and athletic field; that in May of 1942 certain officers of defendant were taken over plaintiff's grounds by Luthringer who pointed out to them the premises which were subject to a mortgage to E. S. Waldmire; that about February, 1943, a master's deed was given in connection with the foreclosure of this mortgage; that

about that time Luthringer pointed out to defendant's officers that such purchase would include the auditorium and athletic field; that being so advised, defendant entered into a contract for deed with Ellen Tucker, the buyer of the premises at the foreclosure sale; that shortly after this contract was made, Luthringer handed over the keys to certain portions of the auditorium and delivered possession of it to defendant; that defendant entered into possession and ceased to pay rent after 1943; that plaintiff did not occupy the auditorium and athletic field after that time; that defendant immediately made repairs to the auditorium and did so annually; and that the plaintiff at no time thereafter made demand for or exercised any control over the auditorium or athletic field until the commencement of the ejectment proceedings in 1954.

8. The trial court held that such proof was improper in that the prior decision of this court had ruled out the defense of title in the defendant through the foreclosure proceeding, the defense of equitable estoppel, and the claim of a resulting or constructive trust. Defendant then made further offers of proof that W. R. Wilson and T. A. Kessel, if called as witnesses, would testify to the same facts as Zimmerman, and the trial court denied such offers.

9. Defendant then called Mrs. Jerome Finkle as an adverse witness, who testified concerning the making of the Waldmire mortgage, its foreclosure, and the attendant master's deed. The objection of plaintiff's counsel to this line of questioning was sustained. Defense counsel then made another offer of proof that if Mrs. Finkle were permitted to testify, she would state that plaintiff gave a certain mortgage to Waldmire, defaulted, and a master's deed was issued to Ellen Tucker; that the premises described in the deed and mortgage are identical; and that Ellen Tucker conveyed the premises by deed to defendant. After this offer of proof had been declined, defendant rested its case.

10. Defendant contends that the evidence fails to establish plaintiff's title and right to possession; that the court erred in refusing to admit the evidence offered on its behalf; and that the exclusion of that evidence deprived defendant of its property without due process of law in that defendant must be given fair and ample opportunity to be heard and thus enforce and protect its rights. Defendant also urges that the doctrine of estoppel is applicable and should have been enforced by the trial court.

11. The evidence established that plaintiff acquired title to lands which included those here in dispute by deed dated May 28, 1917, and the parties stipulated the existence of a continuous chain of title from the government to the date of that deed. When a particular title has been proved, the presumption is that title and ownership continue to exist as established until some change or alienation is shown. (**Dobroth v. Jensen**, 348 Ill. 157; **Kirk v. Kirk**, 325 Ill. 296; **Eggers v. Hardwick**, 155 Ill. App. 254.) This principle stems from the generally recognized rule of evidence that "when the existence of a person, a personal relation or state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." 20 Am. Jur., p. 205, par. 207; also see: 31 C. J. S., pp. 742, 743, par. 124b (3); Cleary, Handbook on Evidence, p. 76, par. 6.9.

12. Thus, the presumption prevailed in favor of the validity of plaintiff's title and the subserviency of defendant's possession to that title until overcome by evidence to the contrary. (**Augustus v. Lydig**, 353 Ill. 215, 220.) There is no evidence of any transfer or conveyance by plaintiff of the two parcels involved subsequent to May 28, 1917, and the presumption is that its title, as established, continued to exist.

13. Plaintiff proved continuous use and possession of the disputed lands from May 28, 1917, to the date in 1943 when defendant admittedly entered, as well as prior use and possession from about 1898 to the date of the deed. In an action of ejectment, plaintiff may recover upon proof of a prima facie title which may be shown by proof of actual possession under a deed or other claim of ownership. (**Thompson v. McGrue,** 3 Ill. 2d 168, 173 and 174; **Schillo v. Martin,** 397 Ill. 211, 216.) When such showing has been made, it devolves upon defendant to introduce evidence to overcome that title and prima facie right to possession. (**Schillo v. Martin,** 397 Ill. 211.) The proof in this case was sufficient to establish prima facie title and right to possession in the plaintiff. Defendants introduced no evidence to overcome the right and title shown to exist. Absent such proof, plaintiff was entitled to a judgment for possession.

14. However, defendant contends that if it had been allowed to make the proof offered on its behalf, plaintiff's prima facie case would have been overcome by a showing of title in defendant through the foreclosure proceedings and the Tucker deed, as well as by facts which would have warranted an application of the doctrine of equitable estoppel. This argument ignores the effect of confession of error in cause No. 34162, November Term, 1956. We stated the effect of that confession of error in 13 Ill. 2d 258, 264: "Defendant did not thus confess to plaintiff's title, as is now contended, but only that its second amended answer was insufficient at law to support its claim of title, and that the answer failed to allege facts upon which plaintiff's claim to title could be estopped. The issues created by the general denial of plaintiff's title and right to possession remained." At page 267, we further stated: "When it is considered that the previous answers filed failed to show defendant had a valid claim to title and possession to the athletic field and auditorium or to plead facts by which

to estop plaintiff's claim of title, and that such failures were confessed, we see no abuse of discretion in the refusal to permit further amendment."

15. Thus, when defendant confessed error in cause No. 34162, it confessed that the Waldmire mortgage, the master's deed and the Tucker deed did not operate to pass plaintiff's title to the athletic field and auditorium, and that the facts pleaded were insufficient to estop plaintiff from asserting its claim of title. The legal sufficiency of those defenses as set forth in the second amended answer was the very matter at issue on the first appeal, and the confession of error operated to remove them forever from the case. While those allegations remained in the second amended answer in the trial involved in this appeal, their legal sufficiency had already been determined and that adjudication was part of the settled law of the case. Any evidence offered in support of the allegations contained in that particular portion of the answer was improper and properly refused.

16. The remandment order in 13 Ill. 2d 258 did not, and could not, revive that part of the answer which had already been adjudged legally insufficient to constitute a defense. After remandment, the only question remaining was the existence of title in plaintiff as put in issue by defendant's general denial. Upon the issue thus joined, defendant was entitled to make proof of any fact tending to show that plaintiff had no title, such as that the consideration for the deed upon which plaintiff based its title and right of entry was illegal, or that the deed was procured by fraud, or was invalid for any other reasons. **Thompson v. McGrue,** 3 Ill. 2d 168, 174.

17. But proof in support of the allegations of the answer asserting title in defendant by reason of the foreclosure proceedings and alleging an equitable estoppel was no longer proper. The trial court's denial of defendant's offer

to prove matters not in issue and no longer a part of the case was not a denial of due process of law. While due process embraces an opportunity to be heard and present evidence relevant to the issues involved, it does not require the admission in evidence of proof which is not germane to the issues made by the pleadings.

18. Defendant urges that plaintiff's failure to reply to the affirmative defenses of the second amended answer had the effect of admitting them, so that no proof of such facts was required. This, of course, assumes that those defenses were an effective and operative part of the answer upon remandment after the confession of error on the first appeal and that they constituted a good defense in law. The legal insufficiency of the defenses had already been confessed and there is no basis for such assumption.

The judgment of the circuit court of Menard County is affirmed.

Judgment affirmed.

APPENDIX B.

Final Decision of Court Below.

State of Illinois
Office of
Clerk of the Supreme Court
Springfield

Mrs. Earle Benjamin Searcy
Clerk

Telephone
8-6435

May 19, 1959

Mr. Kenneth A. Green
Attorney at Law
1700 Broadway Avenue
Mattoon, Illinois

Dear Sir:

In Supreme Court today, in Case No. 35088 entitled:

Old Salem Chautauqua Association,
a corporation, appellee

vs.

Illinois District Council of the Assembly of God, a corp., appellant

Petition for Rehearing was: Denied.

Very truly yours,

Mrs. Earle Benjamin Searcy,
Clerk of the Supreme Court.

APPENDIX C.

Supporting Brief.

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

In re Murchison, 349 U. S. 133, 136, 75 S. Ct. 623.

Where a case has been decided by the State Supreme Court in such a way that a party has not had a proper opportunity to present his evidence, he has been denied due process.

Saunders v. Shaw, 249 U. S. 317, 37 S. Ct. 638, 61 L. Ed. 1163.

Due process means an opportunity to be heard and a resultant action in conformity with the truth deduced at such hearing.

In re American Rio Grand Land and Irrigation Co., 21 F. Supp. 492, 103 F. Supp. 2d 509, Certiorari denied: 308 U. S. 573, 60 S. Ct. 88, 84 L. Ed. 481.

"To constitute due process of law orderly proceedings according to established rules which do not violate fundamental rights must be observed . . . (and) conformable to the fundamental rules of right and affecting all persons alike . . ."

Quoted from: People v. Rettick, 332 Ill. 49, 51;
Requoted from: Brown v. Kienstra, 337 Ill. 641, 643;
Identical language used in: Wenter v. Barrett, 352 Ill. 441, 466;
Reif v. Barrett, 355 Ill. 104, 120.

To afford a litigant due process of law the hearing must be in accord with established procedures, **and he must be given a fair and ample opportunity to be heard,** and to enforce and protect his rights.

> Baumgardner v. Boyer, 384 Ill. 584;
> Valerius v. Perry, 342 Ill. 147, 148.

The law is well settled in this state that proof of actual possession under a deed (defendant's deed is shown at Abst. pp. 32-35) and other claim of ownership, is prima facie evidence of title, and is sufficient evidence upon which to recover in ejectment until a better title is shown.

> Blanz v. Ziabeck, 233 Ill. 22, 24;
> Barger v. Hobbs, 67 Ill. 592, 597;
> Casey v. Kimmel, 181 Ill. 154, 157.

Respectfully submitted,

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188 West Randolph Street,
Chicago, Illinois,
Of Counsel.

FILE COPY

No. 307

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1959

ILLINOIS DISTRICT COUNCIL OF THE ASSEMBLY OF GOD, a Corporation,

Petitioner,

versus

OLD SALEM CHAUTAUQUA ASSOCIATION, a Corporation,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois, Cause No. 35,088.

There Heard on Appeal from the Circuit Court of Menard County, Illinois.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR CERTIORARI

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

I.

The opinion delivered in the Supreme Court of the State of Illinois is reported in the following reports:

16 Ill. 2d 470;
158 N.E. 2d 38.

II.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete and inaccurate in the following material respect.

On October 21, 1955 the trial court overruled Plaintiff's Motion to Strike Defendant's Second Amended Answer which alleged title in Defendant by virtue of the Waldmire Mortgage, Master's Deed and Tucker Deed, and also alleged facts purporting to constitute the defense of estoppel. On May 17, 1956, Plaintiff having elected to stand on its motion, the Court entered judgment against the Plaintiff on the pleadings (Abst. pp. 49-50). From this judgment Plaintiff appealed and requested a judgment reversing and remanding the cause with directions to strike those portions of the Second Amended Answer relating to the Auditorium and the Athletic Field. On this appeal, Defendant confessed error as to each error alleged in Plaintiff's Notice of Appeal (Abst. p. 54).

On page 6 of the Petition Petitioner states that the Waldmire Mortgage, the Master's Deed, and the Tucker Deed conveyed the Auditorium and Athletic Field to the Defendant. In view of Defendant's confession of error on the first appeal in the cause, and the effect thereof, this statement is inaccurate.

III.

ARGUMENT

On the first appeal to the Supreme Court in this cause, Defendant confessed that its Second Amended Answer, which included the title documents upon which it relied, was insufficient in law to constitute the defense of title in itself or the defense of estoppel against the Plaintiff.

On the second appeal to the Supreme Court in this cause, that Court so interpreted Defendant's Confession of Error. The Court said:

> "Defendant did not thus confess to Plaintiff's title, . . . but only that its second amended answer was insufficient at law to support its claim of title, and that the answer failed to allege facts upon which Plaintiff's claim to title could be estopped."
>
> 13 Illinois 2d 258, p. 264.

In the trial of this cause Defendant had the opportunity to show Plaintiff's lack of title, if such had been the fact, by showing title in a third party, but the Court correctly refused to hear Defendant's evidence purporting to show title in itself based upon the Waldmire Mortgage, the Master's Deed and the Tucker Deed since Defendant had confessed lack of such title upon the first appeal in this cause.

IV.

CONCLUSION

Petitioner has not been deprived of any rights under the due process clause of the Constitution of the United States and consequently, its Petition for Certiorari should be denied.

Respectfully submitted,

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